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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BENJAMIN ALLEN POPE,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

On Appeal From The Court Of Criminal Appeals Of Texas

APPELLANT'S MOTION FOR LEAVE TO FILE HIS APPEAL AND HIS JURISDICTIONAL STATEMENT

DOUGAL C. POPE
Attorney for Appellant
2317 Bissonnet
Houston, Texas 77005
(713) 527-9325

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

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To The Honorable Court:

Now comes the Appellant and files this his Motion for Leave to File his Appeal and his Jurisdictional Statement and as grounds therefor says as follows:

1.

The appeal involves the question of whether the cocaine portion of the Texas Controlled Substance Act[1] is unconstitutional. Since the Act does not provide sufficient standards or the elements necessary to define cocaine, that Act violates the due process clause of the Fifth and the Fourteenth Amendments of the United States Constitution.

2.

Appellant was indicted for the possession of cocaine. Prior to the trial of his case in the 177th Judicial District Court of Harris County, Texas (Trial Court), the Appellant filed his First Motion to Dismiss the Indictment which was presented to and heard by the Trial Court prior to the Appellant's announcement of ready for trial. That Motion to Dismiss alleged that Article 4476-15 of Vernon's Annotated Texas Civil Statutes was unconstitutional as it applied to cocaine. That Motion pointed out that the Statute did not define what constitutes the contents or the elements of cocaine and that the Statute does not set out any standards as to what constitutes cocaine. The way the Statute is written a person must speculate as to whether a particular substance or compound would constitute cocaine. That Motion quoted as authority the cases of *Dunn v. United States,* 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979) and *United States v. Harris,* 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989 (1954).

The Trial Court overruled the Appellant's Motion to Dismiss and thereafter, the Appellant entered his plea

1. Article 4476-15, Sections 2.01, 2.02 and 2.04(b)(4) of Vernon's Annotated Texas Civil Statutes.

of nolo contendere and he was sentenced to two years in the Texas Department of Corrections.

3.

Appellant timely filed his Notice of Appeal to the Court of Appeals of the Fourteenth Supreme Judicial District of Texas (Court of Appeals) and the question of whether the cocaine portion of the Texas Controlled Substance Act was constitutional was presented to that Court in Point of Error No. 5. The Court of Appeals affirmed the conviction and held that the Statute was constitutional. The opinion of the Court of Appeals is reported at 667 S.W.2d 163. Thereafter, the Appellant filed his Petition for Discretionary Review with the Texas Court of Criminal Appeals (Court of Criminal Appeals), the highest Texas court for criminal matters, and that Court refused to grant discretionary review. Thereafter, Appellant filed his Motion for Rehearing, and the Court of Criminal Appeals denied that Motion for Rehearing on April 25, 1984. On or about May 14, 1984, Appellant filed his Notice of Appeal to the United States Supreme Court in both the Court of Appeals and the Court of Criminal Appeals as he was uncertain in which court that the Notice of Appeal should be filed.

4.

This Court has jurisdiction of this appeal under the provisions of 28 U.S.C. Section 1257(2) which provides:

> Section 1257. State courts; appeal; certiorari
>
> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

5.

The portions of Article 4476-15 of Vernon's Annotated Texas Civil Statutes involved in this proceeding are as follows:

SUBCHAPTER 2, STANDARD AND SCHEDULES

Controlled substances

Section 2.01. The legislature determines that the substances listed in Schedules I, II, III, IV, and V and in Penalty Groups 1, 2, 3, and 4 shall be controlled substances.

Nomenclature

Sec. 2.02. The controlled substances listed or to be listed in the schedules in Schedules I, II, III, IV, and V and Penalty Groups 1, 2, 3, and 4 are included by whatever official, common, usual, chemical or trade name they may be designated.

* * *

Schedule II

Sec. 2.04. (a) Schedule II shall consist of the controlled substances listed in this section.

(b) Any of the following substances, except those narcotic drugs listed in other schedules, however produced:

* * *

(4) Cocaine, including its salts, isomers (whether optical, position, or geometric) and salts of such isomers; coca leaves, and any salt, compound, derivative, or prepa-

ration thereof which is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions which do not contain cocaine or ecgonine.

6.

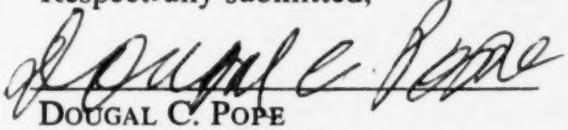
Appellant is challenging the constitutionality of Article 4476-15, Section 2.02 and Section 2.04(b) of Vernon's Annotated Texas Civil Statutes which covers cocaine. Those sections of the Statute do not provide sufficient standards or the elements necessary to define cocaine, and this is a violation of the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution and of the Texas Constitution.

7.

Appellant is filing his Jurisdictional Statement with this Motion.

Wherefore, premises considered, Appellant asks this Court to hear this appeal and hold that the Texas Controlled Substance Act, Article 4476-15, as applied to cocaine is a violation of the Appellant's due process rights and that the Statute is unconstitutional and that Appellant's conviction be reversed and the Indictment dismissed and that he have such other and further relief to which he may be entitled.

Respectfully submitted,



DOUGAL C. POPE
Attorney for Appellant
2317 Bissonnet
Houston, Texas 77005
(713) 527-9325

CERTIFICATE OF SERVICE

Three copies of the foregoing were served on all parties required to be served and they were mailed to each of the following on the 16 day of July, 1984, by certified mail, return receipt requested, with sufficient postage affixed to the particular envelopes:

Mr. Richard Mason
Assistant District Attorney
201 Fannin
Houston, Texas 77002

Certified Mail #3881872
Return Receipt Requested

State Prosecuting Attorney
P. O. Box 12405
Austin, Texas 78711

Certified Mail #3881873
Return Receipt Requested

Dougal C. Pope

DOUGAL C. POPE